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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES HENRY MILLER, Petitioner,

and

OLLIE J. MILLER, Plaintiff,

v.

R.D. SIMMONS, Detective;
R.W. LEARY, Sheriff; and
his DEPUTY SHERIFF JAILERS
in/for Durham, North Carolina, Respondents.

RULE 28.5(a) AFFIDAVIT OF SERVICE BY MAIL

I, William McBlief, being duly sworn, depose and say that I served a copy the foregoing Brief in Opposition on all parties required to be served by Rules 22.1 and 28.3 of the Rules of the Supreme Court of the United States by depositing said copies in a United States mailbox, first class postage prepaid, addressed to the following:

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Further the affiant sayeth not.

This the 17 day of July, 1987.

William McBlief

William McBlief
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919/721-3664

SWORN TO AND SUBSCRIBED before me

this the 17th day of July, 1987.

Molly I. Thacker

Notary Public

My Commission Expires: 9-7-87

MOLLY I. THACKER
NOTARY PUBLIC
GUILFORD COUNTY, NC

No. 66-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JAMES HENRY MILLER

Petitioner,

and

OLLIE J. MILLER,

Plaintiff,

v.

R. D. SIMMONS, DETECTIVE;
R. W. LEARY, SHERIFF and
his DEPUTY SHERIFF JAILERS
in/for DURHAM, NORTH CAROLINA,

Respondents.

RULE 26.1 AFFIDAVIT OF FILING BY MAIL

I, Hugh Stevens, being duly sworn, depose and say that I am a member of the Supreme Court Bar and that to my knowledge the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit of petitioner James Henry Miller was filed within the permitted time by depositing on June 10, 1987 a copy of the Petition in a United States post office, with first class postage pre-paid, and properly addressed to the Clerk of the Court as follows: Office of the Clerk, Supreme Court of the United States, Washington, DC 20543.

Further the affiant says: not.

This the 10th day of June, 1987.


Hugh Stevens

Sworn to and subscribed before me
this the 10th day of June, 1987.


Notary Public
My Commission Expires 8-16-89

QUESTION PRESENTED

Does the prisoner's appeal of the District Court's Order of August 29, 1985, denying his motion for court-appointed counsel under § 1915(d) in this § 1983 action, constitute a premature appeal from an interlocutory unappealable order?

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and

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R.W. LEARY, Sheriff; and
his DEPUTY SHERIFF JAILERS
in/for Durham, North Carolina, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF CASE

Petitioner brought this § 1983 action against Durham City Police Detective R.D. Simmons, the arresting officer, against R.W. Leary, Durham County Sheriff, and against unnamed Durham County Deputy Sheriff Jailers on November 28, 1984. The pro se Complaint alleged that defendants denied petitioner his medication during his brief confinement in the Durham County Jail from October 3 to October 18, 1984. The Complaint did not allege denial of a physician.

Simmons had custody of petitioner for less than an hour. Petitioner made no specific allegations concerning Leary and later admitted that he did not have personal contact with Leary. Petitioner never served the unnamed defendants with process and the District Court dropped them from the caption. App. B at 14a.

On January 16, 1985, Leary filed his Motion for Summary Judgment, supported by two Affidavits with voluminous Jail records attached. The Affidavits and Jail records showed

that during his confinement from October 2 to October 19, 1984, petitioner received and signed for his medications, except for October 2, 1984, and saw two different physicians.

Petitioner then moved for court-appointed counsel on July 15, 1985 pursuant to 28 U.S.C.A. § 1915(d). On August 29, 1985, the District Court entered the Order, made the basis of petitioner's appeal, denying petitioner's motion but extending the discovery period and requiring the refiling of dispositive motions. App. B. Subsequently, on December 11, 1985, Leary resubmitted his Motion for Summary Judgment pursuant to the Order of August 29, 1985.

Although petitioner's motion for court-appointed counsel under § 1915(d) referred to another motion under § 1915(a) to proceed in forma pauperis, Leary has never received a copy of this alleged motion. Therefore, the question exists whether petitioner had standing to make the § 1915(d) motion. Such a § 1915(a) motion constitutes a predicate to a § 1915(d) motion for court-appointed counsel. See Boyce v. Alizadeh, 595 F.2d 948, 950 (4th Cir. 1979)(held: two step procedure: determination of plaintiff's economic status followed by determination of frivolity or malice). See also, United States v. Celani, 748 F.2d 363, 365 (7th Cir. 1984)(re: § 3006A). In short, petitioner did not show himself a "person unable to employ counsel" at the time he made his motion. Section 1915(d). As a result, if petitioner lacked standing to invoke § 1915(d), then no occasion may exist to reach the question presented for review regarding the immediate appealability of the denial of court-appointed counsel.

REASONS FOR DENYING THE WRIT

The decision below concerns appointment of counsel pursuant to 28 U.S.C.A. § 1915(d) in a § 1983 action brought by a prisoner. It does not concern appointment pursuant to

some other provision, such as § 42 U.S.C.A. § 2000e-5(f)(1) in a Title VII case or 18 U.S.C.A. § 3006A(g) in a criminal or habeas corpus case. At least one Circuit has reached different results depending upon the particular statutory grounds for the motion. Compare Bradshaw v. Zoological Society (Bradshaw II), 662 F.2d 1301, 1305-18 (9th Cir. 1981)(orders denying appointed counsel in Title VII cases constitute appealable orders) to Kuster v. Block, 773 F.2d 1048, 1049 (9th Cir. 1985) (such orders not immediately appealable in a § 1983 case); and to Weygandt v. Look, 718 F.2d 952, 953-54 (9th Cir. 1983)(such orders not immediately appealable in a habeas corpus case). According to the Ninth Circuit, the cases do not conflict. Wilborn v. Escalderon, 789 F.2d 1328, 1330 n.3. (9th Cir. 1986)(per curiam). Consequently, the apprehension of the conflict among the various Courts of Appeal and the apprehension of the importance of the question for review must focus on § 1915(d); otherwise, the failure to distinguish the particular statutory basis will distort the analysis.

I. Conflict Among Courts of Appeal.

All the other Circuits except the D.C. Circuit have considered the appealability of an order denying appointment of counsel under § 1915(d). Seven of these Circuits have held that such orders constitute non-appealable interlocutory orders. Appleby v. Meachum, 696 F.2d 145, 146-47 (1st Cir. 1983)(per curiam)(prisoner § 1983 case); Welch v. Smith, 810 F.2d 40, 41-42 (2d Cir. 1987), petition for cert. filed, ___ U.S.L.W. ___ (U.S. April 18, 1987)(No. ___)(prisoner § 1983 case); Smith-Bey v. Petsock, 741 F.2d 22, 23-26 (3d Cir. 1984)(prisoner § 1983 case); Henry v. City of Detroit Manpower Dept., 763 F.2d 757, 760-64 (6th Cir. 1985)(en banc), cert. denied, ___ U.S. ___, 106 S.Ct. 604, 88 L.E.2d 582 (1985)(Title VII and § 1983 employment discrimination case); Randle v. Victor Welding Supply Co., 664

F.2d 1064, 1065-67 (7th Cir. 1981)(per curiam)(prisoner case); Kuster, 773 F.2d at 1049 (§ 1983 case); and Cotner v. Mason, 657 F.2d 1390, 1391-92 (10th Cir. 1981)(per curiam)(unspecified civil case). Only two Circuits have held otherwise. Jackson v. Dallas Police Dept., 811 F.2d 260, 261 (5th Cir. 1986)(per curiam)(arrestee's § 1983 case); Peterson v. Nadler, 452 F.2d 754, 756-58 (8th Cir. 1971) (per curiam)(prisoner case).

However, the impact of the two minority decisions has less force when considered in light of Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 105 S.Ct. 2757, 86 L.E.2d 340 (1985). In this analogous case, the Supreme Court held that an order disqualifying counsel in a civil case does not constitute a collateral order subject to immediate appeal. Id. at ___, 105 S.Ct. at ___, 86 L.E.2d at 353. Both of the Circuits that have expressly disagreed with the § 1915(d) majority rule have either failed to address or have not had occasion to address whether Richardson-Merrell commands a different result. Jackson, 811 F.2d at 261; Peterson, 452 F.2d at 756-58. (Sours v. Norris, 782 F.2d 106 (8th Cir. 1986), the case cited by petitioner, did not address the question of appealability, but considered only the question of appointment.)

II. Importance of Question.

This Court has routinely denied certiorari in cases similar to this one. Henry; Miller v. Pleasure (Miller I), 296 F.2d 283 (2d Cir. 1961), cert denied, 370 U.S. 964 (1962); Miller v. Pleasure (Miller II), 425 F.2d 1205 (2d Cir. 1970)(per curiam), cert denied, 400 U.S. 880 (1970). See also, Welch (petition for writ of certiorari filed April 18, 1987). Furthermore, motions for court-appointed counsel pursuant to § 1915(d), as compared to such motions pursuant to § 2000e-5(f)(1) or § 3006A(g), occur "much less frequently." United States v. 30.64 Acres of Land, 795 F.2d

726, 799 n.5 (9th Cir. 1986). Finally, the enforcement of civil rights claims by indigent litigants already has an effective statutory spur: 42 U.S.C.A. § 1988, the provision allowing the prevailing party to recover his attorney's fee.

III. Merits.

The Court below correctly decided the issue.

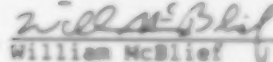
Richardson-Merrell; Flanagan v. United States, 465 U.S. 259, 270 (1984); Fires one Tire and Rubber Co. v. Risjord, 449 U.S. 368, 377 (1981). The immediate appeal of an order denying a prisoner's motion for court-appointed counsel pursuant to § 1915(d) does not meet the requirements of the Cohen exception to § 1291, as discussed in the Fourth Circuit's opinion. App. A at 7a through 11a.

CONCLUSION

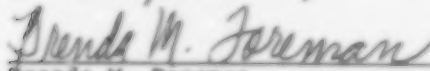
For these reasons, the Supreme Court should deny the petition for a writ of certiorari.

Respectfully submitted,


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